

No. 15,720

IN THE

**United States Court of Appeals
For the Ninth Circuit**

THOMAS B. RUSTAD, HARVEY R. WY-
BORNLY, HOMER C. SKELLY, CHARLES
DIVEN and JAMES JOHNSON,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the
District of Alaska, First Division.

APPELLANTS' PETITION FOR A REHEARING.

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*To the Honorable William Denman, Presiding Judge
and to the Honorable Associate Judges of the
United States Court of Appeals for the Ninth
Circuit:*

Appellants respectfully petition this Court for a rehearing of this cause and present the following specifications of error in its decision as ground for the granting of such petition:

I.

The information failed to charge an offense, as fishing in Zimovia Strait was not made a crime by the

regulations for alleged violation of which appellants were convicted.

II.

The Court erred in its opinion in failing to hold that the regulation sought to be enforced was invalid due to indefiniteness.

I.

THE INFORMATION ON WHICH APPELLANTS WERE CONVICTED FAILED TO CHARGE A CRIME AND ALTHOUGH NOT ASSIGNED AS ERROR SUCH A DEFECT SHALL BE NOTICED AT ANY TIME.

The information charged that appellants were fishing in Zimovia Strait on July 12, 1956, the waters of Zimovia Strait then being an area closed to commercial fishing "within the meaning of 48 U.S. Code, Section 222 (Alaska Commercial Fisheries Regulations 1956, Sections 121.3 and 121.4)." (Tr. 3.) There is no general statutory closure of commercial fishing in Alaska aside from specific provisions dealing with fishing within a specified area from the mouth of streams which is not here involved. 48 U.S. Code Annotated, Section 221 authorizes the Secretary of the Interior to set apart fishing areas and to establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Section 222 makes it unlawful to fish in an area during the time that fishing is prohibited therein.

The particular regulations promulgated by the Secretary of the Interior under which appellants were

charged are Sections 121.3 and 121.4 of the Alaska Commercial Fisheries Regulations of 1956. Section 121.3 specified:

“Fishing, other than trolling, in Ernest Sound, and the open waters in the vicinity of Anan Creek (excluding Zimovia Strait) is prohibited except from 6 o’clock antemeridian July 15 to 6 o’clock postmeridian August 18 . . .”

It is noted that this section prohibits fishing in the Ernest Sound and the open waters of Anan Creek but excludes Zimovia Strait from the prohibition. Accordingly, it is clear that Section 121.3 does not prohibit fishing in Zimovia Strait.

Furthermore, it is also clear that Zimovia Strait is regarded in the Fisheries regulations as a portion of the waters of “Ernest Sound and the open waters in the vicinity of Anan Creek”. In the only Fisheries map issued by the Bureau in Alaska, Appellants’ Exhibit “D” Zimovia Strait falls within the portion of the Sumner Strait District known as the Anan-Ernest Sound Section. That Zimovia Strait is included in the reference to the waters of “Ernest Sound and the open waters of Anan Creek” is further substantiated by the fact that in the regulations it was deemed necessary to exclude Zimovia Strait when referring to those waters. If Zimovia Strait were not to be regarded as a portion of the Ernest Sound and open waters in the vicinity of Anan Creek there would be no reason for the inclusion in regulation 121.3 of the words “excluding Zimovia Strait”. Accordingly, it appears perfectly clear that

Section 121.3 did not prohibit fishing in Zimovia Strait. The only other section referred to in the information is Section 121.4. This section states:

“Open season exception. With the exception of Ernest Sound and the vicinity of Anan Creek, fishing other than trolling is prohibited except from 6 o'clock antemeridian July 20 to 6 o'clock postmeridian August 24. During this season the weekly closed period except for trolling is extended to include the period from 6 o'clock postmeridian Friday to 6 o'clock antemeridian Monday.”

In essence this section states that with the exception of “Ernest Sound and vicinity of Anan Creek” fishing is prohibited until after July 20.

Again it is to be noted that Zimovia Strait is regarded as a portion of “Ernest Sound and the vicinity of Anan Creek”. Since those waters are excepted from the prohibition, it was perfectly legal to fish therein.

Admittedly this point was not raised by appellants specifications of error and was not arised in the Court below although the question of indefiniteness of the regulation was strongly argued. Rule 52(b) of the Federal Rules of Criminal Procedure specifices:

“Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court”.

This rule appears to be discretionary to a certain extent although there are numerous categorical statements to the effect that Appellate Courts will recog-

nize plain errors although not brought formally to their attention. See *U. S. v. Morrissey*, 32 Fed. 147; *Durham v. U. S.*, 237 F. 2d 760, footnote 4, page 761 (9th Circuit); *Stewart v. U. S.*, 214 F. 2d 879 (CCADC); *Taylor v. U. S.*, 222 F. 2d 398 at 404 (CCADC); *U. S. v. Tennessee & CR Co.*, 176 U.S. 242, 44 Law. Ed. 452.

Even more persuasive and more directly in point than Rule 52(b) is Rule 12(b)(2) of the Federal Rules of Criminal Procedure which specifies in part, "Lack of jurisdiction or the failure of the indictment or information to charge an offense *shall* be noticed by the court at any time during the pendency of the proceedings". (Emphasis ours.)

It is to be noted that this rule applying to the failure of the indictment or information to charge an offense is couched in mandatory language rather than in the permissive language used by Rule 52(b). It is stated in Barron's Federal Practice & Procedure, Volume 4, page 103:

"Thus lack of jurisdiction may be raised at any stage of the proceeding and must be noticed by the court even if not raised by motion or objection. In like manner objection that the indictment or information fails to charge an offense may be made at any stage of the proceeding."

In the case of *U. S. v. Manuszak*, 234 F. 2d 421 (Third Cir) it was held that an essential element of the crime was lacking in the indictment and the Court held in reversing a conviction,

“Although the alleged defect was not brought to the attention of the District Court it can properly be raised in this court for such a defect shall be noticed at any time.”

An almost identical situation to the subject case has arisen in this Honorable Court, *Hotch v. U. S.*, 208 F. 2d 244, on petition for rehearing 208 F. 2d 249, and denying further rehearing 212 F. 2d 280. In that case Hotch was convicted for fishing in an area closed to commercial fishing. The case was tried before the District Court upon an agreed statement of facts and after conviction was argued before this learned Court. The conviction was affirmed. By petition for rehearing, for the first time the question was raised that the information did not charge a crime due to the fact that there was no effective regulation closing the area to fishing on the day appellant was apprehended. The regulation closing the area for fishing on the date involved had been promulgated and notice thereof furnished to Hotch. The regulation had not been published in the Federal Register at the time of the alleged offense. Although this matter was first brought to the Court on the petition for rehearing, the Court quoted Rule 12(b)(2), cited *supra*, and the Court took note of this jurisdictional defense. The government's petition for rehearing was denied, the Court holding at 212 F. 2d 284:

“If certain acts have not been made crimes by duly enacted law, the knowledge of their contemplated administrative proscription cannot subject the informed person to criminal prosecution.

While ignorance of the law is no defense, it is conversely true that a law which has not been duly enacted is not a law, and therefore a person who does not comply with its provisions cannot be guilty of any crime.”

In the subject case there was no duly enacted law prohibiting fishing in Zimovia Strait at the time appellants were apprehended. It is respectfully submitted that the failure of the information to charge a crime should be noticed by this Court and the rehearing granted reversing the conviction of the Court below.

Judge Pope, in his learned concurring opinion in the subject case, referred to administrative construction of Sections 121.3 and 121.4. In the *Hotch* case the administrative construction was that the regulation, having been promulgated and notice having been furnished to the accused, became enforceable. This Court refused to follow such administrative construction. Moreover, it is respectfully submitted that there is no logical construction that can be given of Sections 121.3 and 121.4 whereby fishing in Zimovia Strait may be regarded as prohibited. An administrative construction cannot make a crime when an offense is not otherwise spelled out by regulation.

It is also to be noted that aside from the fact that an enforcement officer of the Fish and Wildlife Service brought a charge against appellants which was prosecuted by the District Attorney there has been no administrative construction on Sections 121.3 and 121.4.

It is further to be noted that appellants did raise the question in their specifications of error that the prohibition of fishing in Zimovia Strait was too indefinite to be enforceable. If there is ambiguity in the regulation, it would appear to fall within the specification of error 1(a) wherein appellants contended:

“The District Court erred:

“1. In denying appellants’ motions for judgment of acquittal made at the conclusion of the government’s case and at the conclusion of the entire case and appellants’ motion for judgment of acquittal notwithstanding the verdict and by so doing:

“(a) Failing to rule that the regulation sought to be enforced was invalid due to indefiniteness.”

Accordingly, it would appear that the specification of error alleged would warrant consideration of whether the regulation was too indefinite to be enforceable and that if the regulation were to be regarded as presenting an ambiguous proposition pertaining to the prohibition of fishing in Zimovia Strait, the regulation should be held invalid as presented by the specification of error referred to above.

II.

THE COURT ERRED IN ITS OPINION IN FAILING TO HOLD THAT THE REGULATION SOUGHT TO BE ENFORCED WAS INVALID DUE TO INDEFINITENESS.

In the opinion of this learned Court arguments were set forth to sustain the validity of the prohibition of fishing in Zimovia Strait on the basis that allegedly

no other vessels were fishing in the area in question and further for the reason that government's Exhibit 1, a map of the United States Coast and Geodetic Survey, No. 8161, had the words Zimovia Strait written in an area so that the letter "r" appeared opposite the point where appellants were fishing.

The record shows that there were other boats fishing in the area alleged by the government to constitute Zimovia Strait although admittedly the bulk of the boats were fishing close to the mouth of Anan Creek where the fish normally congregate. Thus the witness Rustad testified, page 230, that

"As we rounded Thorne's Point to the north there was one vessel just completing a set."

Furthermore, the record shows that another vessel was apprehended fishing in the narrow part of Zimovia Strait well to the north of where the appellants were found and that the captain of that vessel was fined \$150.00 and the members of the crew \$50.00, being less than one-tenth of the fine imposed on appellants in the subject case. (R. 292, 295.)

With reference to the argument pertaining to the lettering on Chart No. 8161, it is submitted that the United States Coast and Geodetic Chart No. 8201, of which this Court may take judicial notice, shows the lettering of Zimovia Strait with the last letter "t" terminating well above Thoms' place and considerably north of the location where appellants were fishing. This chart is also commonly used in navigation and a copy has been tendered to the clerk of this Honorable

Court. Certainly the lettering on a chart is too indefinite a criteria when no particular chart is referred to in the regulation. It is respectfully submitted that the lower Court should have ruled that the regulation was too indefinite to be enforceable.

CONCLUSION.

It is respectfully submitted that the information fails to charge an offense cognizable at law and that a rehearing should be granted.

Dated, Juneau, Alaska,
July 17, 1958.

FAULKNER, BANFIELD & BOOCHEVER,
By R. BOOCHEVER,
*Attorneys for Appellants
and Petitioners.*

CERTIFICATE OF COUNSEL

I, R. Boochever, one of counsel for the appellants and petitioners, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and I further certify that the same is not interposed for delay.

Dated, Juneau, Alaska,
July 17, 1958.

R. BOOCHEVER,
*Of Counsel for Appellants
and Petitioners.*

